U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 29 July 2008

Case No.: 2008-AIR-00008

In the Matter of:

BERNIE RICKMAN,
Complainant,

v.

HONEYWELL INTERNATIONAL, INC.,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises out of a complaint filed by Bernie Rickman ("Complainant") against Honeywell International, Inc. ("Respondent"), under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121 et seq. The statute and its implementing regulations (appearing at 29 C.F.R. Part 1979) prohibit discriminatory actions by airlines or their contractors or subcontractors against employees who, *inter alia*, provide information to their employer relating to an actual or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or of any other provision of federal law relating to air carrier safety. Title 29 C.F.R. §1979.103(d) requires an employee who has been subjected to such discrimination to file a complaint within 90 days after the discriminatory decision has been both made and communicated to the employee. In this matter, Complainant failed to file a timely claim, and has not shown that he is entitled to equitable relief from the statutory time limits. Consequently, his claim must be dismissed.

I. PROCEDURAL HISTORY

Complainant filed his complaint under AIR21 on April 10, 2008, alleging that he had been wrongfully terminated in October of 2007. The Acting Regional Administrator of the Occupational Safety and Health Administration (OSHA) dismissed the complaint as untimely on April 15, 2008. Complainant requested a hearing with an administrative law judge by letter dated April 25, 2008. On May 9, 2008, I issued an order setting a schedule for discovery and briefs on the sole issue of timeliness. Respondent filed its motion to dismiss for untimeliness on July 9, 2008, and Claimant filed his response by facsimile on July 25, 2008.

II. FACTUAL BACKGROUND[1]

A. COMPLAINT

Complainant had been employed as an Electronic Technician with Respondent for over 21 years when his employment was terminated in October of 2007. In August of 2007, Complainant reported to his employer that the CL605 Selector that he was assigned to work on could not be processed, because there was not a valid wire list for the units being built in Mexico. Presumably, the CL605 Selector on which he was working had been built in Mexico. Complainant reported the problem with the wire list for the Selector to his chain of command, and ultimately to Respondent's quality engineer. On September 25, 2007, Complainant was summoned to answer questions from a Mr. Ortiz from "Corporate" and Ms. Martin from Human Resources. Complainant explained to Mr. Ortiz and Ms. Martin that there had been no Proof-of-Build done for the initial production unit of the CL605 Selector and, had a Proof-of-Build been done, the wire-list problem would have been detected. Later that same day, Complainant was again summoned by Ms. Martin and Mr. Ortiz. The latter accused Complainant of lying about the wire-list issue, and accused him of doing the Proof-of-Build himself.

According to Complainant, use of the non-conforming hardware would have jeopardized safety in the air space.

On February 11, 2008, someone left evidence outside Complainant's front door showing that he had been truthful in his reports to his employer. In addition, Complainant's former Group Team Leader told Complainant's attorney that Complainant had done nothing wrong, but had reported deficiencies in a proper and timely manner.

B. OBJECTION TO OSHA FINDINGS

Complainant objected to the OSHA findings on the grounds that he had no evidence to support his claim that he was unjustly terminated until receipt of the package at his front door on February 11, 2008. In addition, he repeated the allegations of his initial Complaint.

C. RESPONSE TO MOTION TO DISMISS

First, Complainant once again alleged that he received a package at his front door on February 11, 2008, showing that the reason given for his termination in October 2007 was false.

Second, Complainant re-asserted that he had been accused of doing the Proof-Of-Build on the selector when he had not done so. He additionally alleged that the error in the wire list for the selector happened twice before it was finally corrected on July 13, 2007, and that the correct wire list was not released to the production staff until December of 2007. He alleges that these facts show he was truthful when he told his chain of command that the selector units could not be shipped because there was not a correct approved and released wire list.

[1] In reaching my conclusion in this matter, I have assumed the truth of the allegations in the Complaint, in Complainant's objections to the decision of the Regional Administrator, and in his response to my Order to Show Cause. In light of his *pro se* status, I have not held him to the evidentiary standards that would ordinarily apply.

Third, Complainant alleges for the first time that he reported that a different part (a bezel assembly) had been mis-wired by the vendor who manufactured it for Honeywell. His report was corroborated by Respondent's manufacturing engineer; however, their recommendation to return the units to the vendor was overruled because the customer needed them. This defect was not corrected until August 23, 2007, according to a document in the package received on February 11, 2008.

According to Complainant, the documentation he received on February 11, 2008 proves that his representations to Ms. Martin and Mr. Ortiz on September 25, 2007 were truthful and factual, and that his AIR21 complaint was filed within 90 days of receiving the package at his front door.

III. LEGAL FRAMEWORK

A. STANDARD FOR DISMISSAL

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not address a motion to dismiss, 29 C.F.R. § 18.1 (a) provides that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. Tribunals have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mirza,* 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F.Supp. 1224 (M.D. Pa. 1983); *Johnson v. Baskerville*, 568 F.Supp. 853 (E.D. Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981). Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant's allegations are true, he has stated a cause of action upon which relief can be granted. Assuming the truth of Complainant's allegations, I find that the Complainant failed to file a timely complaint, and has failed to show that he is entitled to relief from his untimeliness.

B. WHISTLEBLOWER PROTECTION PROVISIONS OF AIR21

AIR21 provides whistleblower protection for employees of air carriers or their contractors or subcontractors who provide information relating to violations or alleged violations of any order, regulation, or standard of the FAA or of any other provision of federal law relating to air carrier safety. To be protected, the information must have been provided to the employer or to the federal government.

Within 90 days of an adverse personnel action, a complainant my file a complaint with the regional administrator of OSHA. OSHA, in turn, performs a gatekeeper role by initially assessing whether the complainant has made out a prima facie showing that his engaging in protected activity was a contributing factor in the adverse personnel action. Such a prima facie showing consists of evidence that: (1) the complainant engaged in protected activity; (2) the employer knew or suspected, actually or constructively, that the complainant was engaged in protected activity; (3) the complainant was subjected to adverse action; and (4) the evidence is

sufficient to raise a reasonable inference that the protected activity was a contributing factor in the adverse action. 49 U.S.C. 42121(b)(2)(B)(i); 29 C.F.R. 1979.104(b)(1-2). If the complaint and interviews of the complainant satisfy these criteria, then OSHA will conduct an investigation. 49 U.S.C. § 42121(b)(2)(B)(i). Otherwise, OSHA "shall" dismiss the complaint and "shall" not conduct an investigation. *Ibid.* A party may object to OSHA's decision, whether based on an investigation or not, and request a hearing before an administrative law judge. 29 C.F.R. § 1979.106.

At the hearing stage, a respondent must prove by a preponderance of the evidence that protected activity was a contributing factor in the employer's decision to take adverse action against him. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

In this matter, OSHA dismissed the complaint not because of a failure to make out a prima facie case, but because Complainant did not file it within 90 days of his termination. Likewise, timeliness of the complaint is the sole issue before me.

IV. DISCUSSION

A. PROTECTED ACTIVITIES

As discussed above, a "protected activity" under the Act consists of providing information regarding violations of certain FAA requirements, or of any other provision of federal law relating to air safety.

Complainant has identified three communications that may qualify as "protected activities": (1) the report to his chain of command in August of 2007 that the CL605 selector could not be safely made, due to the lack of a proper wire list; (2) the report to Mr. Ortiz and Ms. Martin on September 25, 2007, concerning the same issue; and (3) the report to his group leader in April of 2006 that the bezel assembly had been mis-wired by the vendor. As the last was not included in the initial Complaint, I will disregard it for purposes of this Decision and Order.[2]

As presented, it is unclear whether the Complainant's reports regarding the CL605 selector qualify as protected activities. Complainant has not identified a standard, order, or regulation of the FAA, or any other provision of federal law relating to air safety, that was violated by the lack of a proper wire list. Nonetheless, because the sole issue I identified for resolution was timeliness, and not the sufficiency of the Complaint's allegations, I will assume for the purpose of this decision that Complainant's reports of improper wire list consisted a protected activity.

B. ADVERSE EMPLOYMENT ACTION

Under 49 U.S.C. § 42121(a), "No air carrier or contractor or subcontractor of an air carrier may discharge an employee" who engages in protected activity. In this matter,

[2] Even if it had been included in the original Complaint, it would make no difference: the adverse employment action took place in October of 2007, whether it was based on the August and September 2007 communications, or on the April 2006 report, or both.

Complainant was discharged from employment in October 2007, shortly after the September 25, 2007 meeting in which he communicated his concerns over the improper wire list. Termination of employment is clearly an adverse employment action, and is specifically prohibited in AIR21 when it is based on the employee's engaging in a protected activity. When, as here, the adverse action occurs shortly after the protected activity, an inference is raised that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1979.104(b)(2). I find, solely for purposes of this decision, that Complainant was subjected to an adverse action.

C. TIMELINESS

1. Complainant Did Not Timely File His Complaint

An AIR21 complaint must be filed with the Secretary of Labor (OSHA) within 90 days of the alleged retaliation. 49 U.S.C. § 42121(b); 29 C.F.R. § 1979.103(d). The regulations clarify that the alleged violation occurs "when the discriminatory decision has been both made and communicated to the Complainant." 29 C.F.R. § 1980.103(d).

Complainant filed his complaint on April 10, 2008. For that complaint to be timely, some discriminatory act must have occurred on or after January 10, 2008. The alleged discriminatory act in this case – termination of employment – took place in October of 2007, approximately three months earlier and about six months before the complaint was filed. It is clear that the complaint was untimely filed.

2. Complainant Has Misconstrued the 90-Day Requirement

Complainant filed his complaint within 90 days of receiving a package containing evidence that his reports regarding the CL605 issue were truthful and accurate, and argues that his complaint was therefore timely. He misunderstands, however, the event that starts the 90-day clock for filing an AIR21 complaint. The filing period begins to run at the time of the discriminatory act, not at the time that Complainant receives evidence supporting his claim. Had he filed his complaint timely, OSHA's investigatory powers would have required Respondent to produce all documents relating to the wire-list issue. The nature of the investigatory process obviates the need for Complainant to do anything more than make out a prima facie claim, which he clearly could have done without the evidence found at his doorstep in February of 2008.

In sum, the start of the 90-day clock does not depend in any way on the truthfulness of Complainant's report. That Complainant lacked evidence to show that his report was truthful is therefore immaterial to the critical issue: whether Complainant filed his complaint within 90 days of any discriminatory act. He did not.

3. Complainant Is Not Entitled to Relief

Because the 90-day requirement is not jurisdictional, it may be subject to equitable tolling. *See Ferguson v. Boeing Co.*, ARB No. 04-084 n. 44; *see also Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054. Generally, tolling the statute of limitations is proper: (1) when the defendant has actively misled the plaintiff respecting the cause of action;

(2) when the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981)(citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978)); *Ferguson, supra*, n. 44. The restrictions on equitable tolling must be scrupulously observed, and its availability is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987 ERA 53 (Sec'y, Sept. 29, 1989). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. *See Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984).

Complainant has neither claimed nor presented evidence showing that he was misled by Respondent, that he was prevented in any extraordinary (or any) way from asserting his rights, or that he raised the precise statutory claim in issue in the wrong forum. His only justification for delay is that he did not have proof of his truthfulness until February 11, 2008, less than 90 days before he filed his complaint. As discussed above, however, he is not required to show that his safety complaint was truthful in order to make a claim under AIR21.

ORDER

Based on the foregoing, I find that Complainant's claim under the Act is untimely, and that Complainant has not shown that he is entitled to equitable tolling of the filing deadline. Accordingly, this matter is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve

the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).